Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1799

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRED E. BARTLETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

WILLIAM OTIS
JOHN F. DE PUE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial judge's conduct requires that petitioner's convictions be reversed.

2. Whether the jury was properly permitted to determine petitioner's understanding of a question to which he was accused of giving a false answer.

3. Whether the false answers given by petitioner were sufficiently identified in the indictment.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Barnes v. *United States*, 412 U.S. 837 6

Bronston v. *United States*, 409 U.S. 352 7

Cupp v. *Naughten*, 414 U.S. 141 5

Geders v. *United States*, 425 U.S. 80 4

Moore v. *United States*, 598 F. 2d 439 4

Quercia v. *United States*, 289 U.S. 466 4

Russell v. *United States*, 369 U.S. 749 10

Smith v. *United States*, 360 U.S. 1 10

United States v. *Alberti*, 568 F. 2d 617 10

United States v. *Arroyo-Angulo*, 580 F. 2d 1137, cert. denied, 439 U.S. 913 4

United States v. *Bell*, 623 F. 2d 1132 8

United States v. *Chapin*, 515 F. 2d 1274, cert. denied, 423 U.S. 1015 8

United States v. *Cook*, 489 F. 2d 286 8

United States v. *Corr*, 543 F. 2d 1042 8

United States v. *Herring*, 602 F. 2d 1220, cert. denied, 444 U.S. 1046 2

Page

Cases—(Continued):

United States v. *Lovasco*, 431 U.S. 783 10

United States v. *Matthews*, 589 F. 2d 442, cert. denied, 440 U.S. 972 8

United States v. *Middlebrooks*, 618 F. 2d 273 ... 4

United States v. *Rosson*, 441 F. 2d 242 5

United States v. *Slawik*, 548 F. 2d 75 8

United States v. *Tonelli*, 577 F. 2d 194 8

United States v. *Williams*, 536 F. 2d 1202 ..... 8, 9

United States v. *Williams*, 552 F. 2d 226 ..... 8, 9

Youakim v. *Miller*, 425 U.S. 231 10

Statutes:

18 U.S.C. 152 ..... 1, 2

18 U.S.C. 371 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1799

FRED E. BARTLETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1981. A petition for rehearing was denied on February 27, 1981. The petition for a writ of certiorari was filed on April 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiracy to commit fraudulent acts in connection with a bankruptcy proceeding, in violation of 18 U.S.C. 152 and 18 U.S.C. 371 (Count I); of knowingly and fraudulently transferring and concealing property with intent to defeat

the bankruptcy laws, in violation of 18 U.S.C. 152 (Count II); and of making a false statement under oath during a bankruptcy hearing, in violation of 18 U.S.C. 152 (Count IV). He was sentenced to concurrent terms of two years' imprisonment on each count (Pet. App. 3a-4a). The court of appeals affirmed, one judge dissenting (Pet. App. 1a-23a).[1]

The evidence showed that petitioner, an attorney, retained by Robert L. Herring and his brothers to provide legal services in connection with their various family corporate enterprises. In January 1977, one of these ventures, Herco Corporation, began experiencing financial difficulties.[2] The Herring bothers, assisted by petitioner, initiated the formation of several dummy corporations to receive Herco's assets. Transfers of assets to these corporations were aspects of the conspiracy charged in Count I and were the basis of Count II.

At Robert Herring's direction, petitioner travelled to the Bahamas for the purpose of forming a Bahamian corporation to be known as Southern Venture, Limited (SVL). Petitioner suggested SVL's name, retained a Bahamian law firm to incorporate SVL, and transmitted to the law firm a retainer and fees. Herring was to be the sole beneficial owner of SVL, with the business operated through nominee stockholders to conceal Herring's involvement. SVL had

---

[1]No judge requested that the court of appeals be polled on rehearing en banc (Pet. App. 1b).

[2]Herco was engaged in the business of purchasing and selling earth moving equipment. Herring also used it to obtain $1,200,000 from five financial institutions in connection with the financing of a sale of equipment from Herco to a corporation controlled by a collaborator of Herring. The equipment was either owned by others or non-existent. This scheme resulted in Herring's convictions of conducting a racketeering enterprise, in violation of 18 U.S.C. 1962(c), and interstate transportation of fraudulently procured securities, in violation of 18 U.S.C. 2314. See *United States* v. *Herring*, 602 F. 2d 1220, 1222 (5th Cir. 1979), cert. denied, 444 U.S. 1046 (1980).

neither paid-in capital nor a bank account, and its accounts were drawn on checks issued by Herco (*e.g.*, Pet. App. 4a n.2, 5a n.5; Tr. 322-325, 334-335, 465-467, 471, 477-478, 1324-1325). In March 1977, petitioner, acting on behalf of Herco, drew up deeds coveying to SVL two tracts of property owned by Herco's parent corporation as a down payment on bulldozers that Herco was supposedly purchasing from SVL. Ten months later, petitioner conveyed from Herco to SVL a 273 acre farm, ostensibly to satisfy a $300,000 note in SVL's favor secured by the tract (Tr. 479-481; Pet. App. 5a).[3]

Having helped place Herco's assets in the SVL corporate shell, petitioner filed a petition in bankruptcy on behalf of Herco. During a creditors' meeting on June 1, 1978, petitioner was questioned under oath by an attorney for one of Herco's creditors. Petitioner's responses formed the basis of Count IV; this testimony and its context were set forth in Count IV and are repeated in the opinion of the court of appeals (Pet. App. 6a-7a n.7). Petitioner was asked, *inter alia*, about his involvement in establishing SVL and about SVL's acquisition of real estate from Herco. He testified that he had never met anyone from SVL, did not know who the principals of that corporation were, and did not confer with anyone from SVL in drafting the documents of sale.

ARGUMENT

1. Petitioner contends (Pet. 19-20) that the trial judge's conduct denied him a fair trial. Petitioner first criticizes the judge for examining petitioner for approximately one hour following petitioner's direct and cross-examination, which together lasted more than 12 hours (Pet. App. 8a). The judge's questions concerned such subjects as petitioner's

---

[3]Petitioner also assisted in the formation of another dummy corporation, Herco Transportation and Leasing, an entity that was to receive Herco's rolling stock (Tr. 994-995).

understanding of the term "principal" and his knowledge of state corporation law and the ways in which corporate funds and property could be disposed of (Pet. App. 15a-17a n.3; Tr. 1451-1467).

Petitioner identifies no question or series of questions that would have biased the jury against him. The court of appeals, after examing the record, concluded (Pet. App. 8a-9a; citations omitted):

> Following our common law heritage, a judge is not a mere moderator, and he has an obligation and duty to question witnesses and comment on the evidence when necessary. * * * [A] trial judge may elicit facts not yet adduced or clarify those previously presented * * *.
>
> Only when the judge's conduct strays from neutrality is a defendant thereby denied a fair trial as required by the Constitution. That was not the case here as we find the trial judge's cross-examination was a sincere attempt to clarify [petitioner's] most equivocal testimony. On the whole, the court's questions attempted to illuminate [petitioner's] intent, which we view as a material issue in a prosecution for concealing assets.

Moreover, the district judge "was aware of the sensitive role he plays in the eyes of the jury and [gave] * * * cautionary instructions that the jury was not to draw any improper inferences from his interventions * * *" (Pet. App. 9a-10a). See *United States* v. *Middlebrooks*, 618 F. 2d 273, 277 (5th Cir. 1980). The court below held that these instructions were adequate (Pet. App. 10a). The court of appeals' understanding of the law was clearly correct (see, *e.g.*, *Quercia* v. *United States*, 289 U.S. 466, 469 (1933); *Moore* v. *United States*, 598 F. 2d 439, 442 (5th Cir. 1979); see also *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976)), and its conclusion that the particular actions of the trial court in this case were proper does not merit further review by this Court.

Petitioner also alleges that the trial judge's instruction to the jury about the plea bargain of a co-defendant testifying for the prosecution "vouch[ed] for the truth of the testimony" (Pet. 20). The judge, evidently aware that "[t]he jury is entitled to consider and evaluate the interest that a witness may have as a consequence of a plea bargain" (*United States* v. *Rosson*, 441 F. 2d 242, 244 (5th Cir. 1971); see also *United States* v. *Arroyo-Angulo*, 580 F. 2d 1137, 1146 (2d Cir.), cert. denied, 439 U.S. 913 (1978)), advised the jury that it was entitled to evaluate the witness's credibility, that it could consider the plea bargain in doing so, that the sentence recommended by the prosecution as part of the plea bargain was not binding on the sentencing judge, and that since he, the trial judge, would also sentence the witness, "there is always the possibility that * * * a witness [facing sentencing] can endeavor to make a good impression upon the trial judge * * * for the purpose of trying to get a favorable sentence."[4] The instruction was apparently designed to dispel several misconceptions that the judge reasonably believed the jury might have—for example, that it could not consider the plea bargain, that the judge could not consider the witness's truthfulness in sentencing him, or that the plea bargain finally settled the witness's sentence.[5] Petitioner provides no reason for this Court to review the conclusion of the court of appeals—reached after examining the instruction in context (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973))—that the instruction "was proper and * * * was more favorable than not to the defense" (Pet. App. 9a n.8).

---

[4]The entire instruction is quoted at Pet. App. 21a-22a n.6.

[5]The plea bargain specified that the prosecution would recommend a sentence of six months' imprisonment; in fact, the co-defendants who testified for the government received sentences of 18 months' imprisonment (Pet. App. 9a n.8).

Petitioner makes several other unsubstantiated claims about the trial judge's conduct (Pet. 20). These assertions, like all of petitioner's claims about the judge's conduct, were fully aired in the court of appeals, where they were petitioner's "primary contention" (Pet. App. 7a) and were an essential basis of the dissenting opinion. That court concluded that the record as a whole showed that petitioner had received a fair trial (Pet. App. 8a). The court of appeals' determination depends on the particular facts of this case, and petitioner makes no showing that would warrant review by this Court.

2. Petitioner also contends (Pet. 7-17) that he was improperly convicted on Count IV, the false statement charge,[6] because the jury should not have been allowed to conclude that he answered falsely the question about SVL's principals (Pet. App. 7a n.7):

> Q. Do you know the principals of that corporation? Who they are?
>
> A. No, sir.

Petitioner later testified before a grand jury (*ibid.*) that he "knew that [SVL] had no officers or directors. I did know that the only person having any beneficial interest that I knew of was Robert Herring. He was the person who directed Southern Venture. He did no[t] qualify as an officer or director but he was the alter ego of it. * * * He could deal for them. * * * I knew * * * who the beneficial director of that company was. It was Robert Herring. He was the one that set it up. He was the only person who could act for it * * *."

---

[6]Petitioner received concurrent two-year sentences on each of the three counts on which he was convicted (Pet. App. 4a), but this claim and petitioner's third contention (see pages 9-10, *infra*) would affect only his conviction on Count IV. This is another reason for the Court to decline to review these contentions. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

Petitioner contended at trial that he construed "principals" to mean officers and directors of the corporation (Tr. 1154)—whom, by petitioner's own account, he knew not to exist. The trial judge instructed the jury on several possible definitions of the term "principal" (Pet. App. 19a n.4) and concluded (Pet. App. 20a n.4): "It is for you to determine what [petitioner] understood the word principal to mean when he was asked to answer [the] question which is written in [the] indictment * * *." The jury apparently concluded that petitioner understood that "principals" included a person with the attributes petitioner ascribed to Herring in his grand jury testimony. Since, by petitioner's own account, SVL was little more than a corporate extension of Herring, there was a sufficient basis for the jury's determination in the everyday meaning of "principal." In addition, the transcript of the bankruptcy hearing makes it clear that the creditor's attorney questioning petitioner was concerned with the transfer of Herco's assets to SVL and probed petitioner's knowledge of SVL (see Pet. App. 6a-7a n.7); immediately before he asked about SVL's principals, he asked petitioner, "You never met anyone from Southern Ventures, Limited?," and petitioner answered "No, sir" (Pet. App. 7a n.7). This context further supports the jury's determination that neither petitioner nor his interrogator understood "principals" to have a technical, artificially narrow meaning.

Petitioner insists (Pet. 7-10) that his answer was literally true; but the answer incorporated the question, which petitioner himself asserts (Pet. 11-14) was ambiguous. Petitioner's answer was true only if he understood "principals" in the narrow sense he claimed, and that was the precise issue in the trial. For this reason, *Bronston* v. *United States*, 409 U.S. 352 (1973), relied on by petitioner, is not in point. In *Bronston*, it was "undisputed that petitioner's answers were literally truthful" (*id.* at 354), and the issue in the case

concerned the fact that the answers were "not responsive to the question asked and arguably misleading by negative implication" (*id.* at 353).

Here, the issue is whether petitioner's understanding of a question and the meaning he intended in his answer made the answer false. The courts of appeals have held without exception that this issue is for the jury to decide. See *United States* v. *Bell*, 623 F. 2d 1132, 1136 (5th Cir. 1980) (collecting cases); *United States* v. *Matthews*, 589 F. 2d 442, 445 (9th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *United States* v. *Williams*, 552 F. 2d 226, 229 (8th Cir. 1977); *United States* v. *Slawik*, 548 F. 2d 75, 86 (3d Cir. 1977); *United States* v. *Corr*, 543 F. 2d 1042, 1049 (2d Cir. 1976) (collecting cases); *United States* v. *Williams*, 536 F. 2d 1202, 1205 (7th Cir. 1976); *United States* v. *Chapin*, 515 F. 2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).[7] Indeed, no other rule is possible; since few terms are entirely free of some imaginable ambiguity, defendants could, if petitioner's view of the law were correct, often escape conviction for making false statements simply by claiming that they interpreted the question or intended their answer in a way that made the answer truthful.[8]

---

[7]Petitioner relies on *United States* v. *Tonelli*, 577 F 2d 194 (3d Cir. 1978), and *United States* v. *Cook*, 489 F. 2d 286 (9th Cir. 1973). In both of those cases, however, the courts held that the jury could not reasonably have concluded that the defendant understood a meaning that made his answer untruthful. See 577 F. 2d at 199-200; 489 F. 2d at 287. As the Ninth Circuit explained (*United States* v. *Matthews*, *supra*, 589 F. 2d at 445), the question involved in *Cook* could, as a matter of grammar, be construed only in the way the defendant suggested.

[8]There is no merit to petitioner's contention (Pet. 15-17) that the government's case was fatally flawed because it did not call the questioner as a witness. Even assuming that the questioner's intention is relevant—and not just the witness's understanding—the evidence presented by the government was sufficient to establish that both the questioner and petitioner understood "principals" in a way that made petitioner's answer false. See page 7, *supra*. "[T]he intended

3. Finally, petitioner contends (Pet. 18-19) that the false statement count should have been dismissed because it did not state which of the several responses set forth was false and therefore did not give petitioner adequate notice of the charge he would be required to answer.[9] As petitioner suggests, the narrative paragraph in Count IV (Pet. App. 12a n.1) is at best only tenuously related to the false testimony recited in that count (Pet. App. 6a-7a n.7). But petitioner's claim that he was not given adequate notice is without merit. The indictment clearly alleged that petitioner "knowingly and fraudulently did make a false oath * * * in that he testified as follows," and then quotes petitioner's testimony (see note 9, *supra*). The indictment's assertion that petitioner falsely answered "[n]o" to the question, "Do you know ~~any of~~ the principals of [SVL]? Who they are?," left little room for doubt about what the government intended to prove. The count included other testimony, but it is proper for an indictment to contain " 'enough of the testimony surrounding the allegedly false statements to place

---

meaning of a question * * * [is itself, a] matter[] for the jury to decide" (*United States* v. *Williams, supra*, 552 F. 2d at 229; see *United States* v. *Williams, supra*, 536 F. 2d at 1205), and petitioner cites no case holding that the government must always call the questioner as a witness in a prosecution for false testimony.

[9]This count comprises an introductory paragraph which recites (Indictment at 18):

> On or about the 1st day of June 1978, in the Albany Division of the Middle District of Georgia, and within the jurisdiction of this Court, at the first meeting of creditors in the matter of Herco Corporation, Bankruptcy Court * * * [petitioner] knowingly and fraudulently did make a false oath as to a material matter in and in relation to said proceeding in that he testified as follows in answer to questions propounded:

followed by the testimony from the bankruptcy proceeding quoted by the court of appeals at Pet. App. 6a-7a n.7 and the paragraph quoted by the dissenting judge below at Pet. App. 12a n.1.

them in their proper context,' " *United States* v. *Alberti*, 568 F. 2d 617, 624 (2d Cir. 1977), and here, as we have said (see page 7, *supra*), the context was significant. As even the dissenting judge in the court of appeals recognized (Pet. App. 15a-16a, 18a-20a; footnote omitted): "At trial the prosecution and the questioning by the trial judge focused on the truthfulness *vel non* of [petitioner's] answer to the * * * question in which he denied knowing the principals of Southern Venture, Ltd. * * * It is clear to me that between the trial judge's questioning of [petitioner] * * * and his instructions to the jury, the jury concluded that [petitioner] was guilty because he did not answer the question by naming Robert Herring as principal."

Moreover, petitioner does not show that he was in fact surprised or that he was prejudiced by any lack of notice. He identifies no evidence or trial strategy he was unable to use because of uncertainty about the thrust of the government's case. Indeed, in the court of appeals petitioner appears not to have made the claim that he was denied adequate notice (see Brief for Appellant 53-57). Not only would this ordinarily bar him from making such an argument in this Court (see, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); more important, had petitioner actually been surprised, it is reasonable to believe that he would have objected immediately, vigorously, and explicitly. Instead, the structure of his argument both here and in the court below suggests an effort to obtain relief because the indictment was drafted in a questionable fashion that did not prejudice him. Petitioner is not entitled to such relief. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 763 (1962), quoting *Smith* v. *United States*, 360 U.S. 1, 9 (1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

WILLIAM OTIS
JOHN F. DE PUE
Attorneys

JULY 1981

DOJ-1981-07